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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN SURETY COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

This reply memorandum is submitted because of a contention raised by respondent which was not considered in the Government's main brief. Reference will also be made to several other statements in respondent's brief.

1. Respondent has argued in Point I of its brief that the Government failed to prove a cause of action because it failed to show that the work performed by the contractor who replaced Grogan was work required under the contract with Grogan. The contention is that the record is silent as to this, and that the burden of proof rested on the Government as plaintiff.

This point had been unsuccessfully urged by the respondent in the district court (R. 43, 48, 67), in

the course of objections to evidence, without any express indication one way or the other whether it was intended to apply to the Government's claim for liquidated damages as distinct from the claim for excess costs. After the judgment of the district court in favor of the Government in both respects, respondent appealed to the circuit court of appeals. Its Statement of Points on which it intended to rely (R. 91–92) and the Specification of Errors in its brief were not explicit in this connection. But respondent's briefs in the court below argued the point only as a defense to the claim for $2,044.04 excess costs. The circuit court of appeals treated the point only in this connection, and decided that issue against respondent (R. 98). Since respondent did not petition for certiorari, we assumed that the point was no longer in the case.

Respondent had, we believe, good reason for pressing the point only in relation to the excess costs. It would be obviously improper to charge respondent or its principals for the cost of "completion" if the work performed by the new contractor did not conform to that called for in the original contract. But there would be no causal relationship between the amount of liquidated damages accruing *before the termination of the original contract* (which is what we are concerned with here) and any change in the work performed by the new contractor thereafter.

We can concede, however, for present purposes, that the Government would have had no cause of action even for the liquidated damages if it appeared that after terminating Grogan's right to proceed it had changed its mind about completing the Grogan contract and had turned the unfinished building into a radically different structure. In this case the evidence shows the contrary, as both the district court and the circuit court of appeals found. Moreover if, as respondent argues, the record had been silent on the point, the burden of proof would not have rested on the Government.

The district court found as a fact (R. 79):

> That because of the failure of the said defendant, John V. Grogan, to perform his contract, as he was required to do, and to complete the work which he had promised and agreed to complete within the time specified in said contract and granted by the plaintiff, it became necessary for the plaintiff to cause *the said work to be completed* and performed, and at the request of the defendant, American Surety Company, a Corporation, the plaintiff advertised for bids for doing and completing the said work, and let the contract *for completing the said work* to the lowest, responsible bidder. [Italics supplied.]

The court further found that the Government (R. 79)

> * * * was required to, and did, necessarily lay out and expend the sum of $2,-

> 044.04 more in causing *the said work* to be done * * *. [Italics supplied.]

The circuit court of appeals found the evidence sufficient to support these findings (R. 97).

The specifications for the original contract with Grogan and the new contract were not introduced in evidence by either party. The Government proved, however, that when the Grogan contract was terminated the contracting officer for the Government notified respondent, as surety, and asked whether respondent desired "to complete the work as surety on the contractor's bond" (R. 41–42). Respondent replied (R. 42–43):

> that this Company as surety on the contractor's bond does not desire to complete the work. We therefore request that bids be obtained and the contract awarded to the lowest bidder.

The Treasury then advertised for bids "for completion of construction of the United States Inspection Station at Babb-Piegan, Montana" (R. 44–45), and the work was so described in the contract ultimately made (R. 50).

The only reasonable inference to be drawn from this evidence, in the absence of anything more, would be that the new contract was to complete the project begun by Grogan. That was what respondent had been invited to do, and the manner in which the work was described in the new contract indicated that that was what was contemplated. Certainly the trial court was not "clearly

erroneous" (Rule 52 (a)) in reaching this conclusion from the facts before it, in the absence of any contrary evidence.

And even if the record at that stage does not definitely establish that the projects were the same, it certainly was sufficient to shift to respondent the burden of proving that they were not. For the proof that Grogan's rights to complete the Inspection Station had been terminated and that the new contract was for the "completion of the construction of the Inspection Station" at the very least raised a presumption that the new contract was for the completion of the job covered by the Grogan contract.

Furthermore, if there had been no proof at all with respect to whether the work finally done conformed to the original specifications, the nature of the issue is such that it would have been for respondent to establish by way of affirmative defense. The Government made out a *prima facie* case for liquidated damages up to the date of termination when it showed that Grogan was permitted to work beyond the completion date, the date of termination, and perhaps, in general, that the project was completed. It was for respondent then to raise the issue that the final specifications did not sufficiently conform to the original ones. Although we have been able to find no cases involving the burden of proof in this precise situation it has been held that the burden is on a defendant to prove that the cost

of completion of a contract by a plaintiff in similar circumstances is unreasonable, and that in the absence of evidence as to reasonableness the plaintiff may recover the amount actually spent. *Mayor* v. *Second Avenue R. R. Co.*, 102 N. Y. 572, 577, 7 N. E. 905 (1886); *Bacigalupi* v. *Phoenix Building & Construction Co.*, 14 Cal. App. 632, 637, 112 Pac. 892 (1910). That situation is closely analogous to the case at bar. None of the cases cited by respondent (Br. pp. 7–8) is even remotely concerned with the burden of proof;[1] in each case there were evidence and findings as to the difference between the original and the final specifications, and no issue as to burden of proof was presented.

Respondent now seeks to make up for the failure of its counsel below to introduce the specifications in evidence[2] by asking this Court to take judicial notice of the contract specifications and progress reports (Br. p. 8). The reference to this material in respondent's brief (p. 9n) does not prove that the final specifications differed from the original ones. But in any event records as to the performance of a particular public building project in the files of a department of the Government are not judicially noticeable.[3]

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[1] *California Bridge & Construction Co.* v. *United States*, 50 C. Cls. 40, affirmed, 245 U. S. 337; *Pacific Coast Construction Co.* v. *United States*, 53 C. Cls. 382; *Patrick Corr & Sons* v. *United States*, 55 C. Cls. 7.

[2] The records were available at the trial (R. 34, 36).

[3] The cases cited by respondent (p. 8, n. 11) do not deal with material at all comparable.

2. Respondent contends (Br. pp. 19–23) that in four out of "six delay situations" the liquidated damages clause concededly does not apply. Analysis of the "four" situations referred to indicates that they consist only of two, and that each of these has the same good reason for not coming within the purview of the liquidated damages clause.

The first three of respondent's "situations" (Br. pp. 20–21) cite cases in which the contractor's right to proceed was terminated on or prior to the day fixed for completion. This is the precise situation with respect to which the contract permits the Government to recover only excess costs. It is true that the Government may also suffer damage for delay when the right to proceed is terminated before or on the completion date. But from the time of the termination, the contractor no longer has control of the construction; accordingly it is not within his power to determine how long the delay shall be. This will depend upon the speed with which the Government moves in arranging for completion by another contractor and upon the speed with which the new contractor completes the work. The reason for not bringing this situation within the liquidated damages clause is not that there will be uncertainty as to the amount of damages for delay, which is the reason for liquidated damages, but uncertainty as to the extent to which the contractor is responsible for the delay. It is reasonable to draw the line at a point which will avoid

controversy, as to whether the Government has proceeded with adequate expedition to mitigate the damages caused by the contractor's delay.

The fourth of the "situations" (Respondent's Br. p. 22) relates to the period between the termination of the contract and actual completion where, as here, the termination does not occur until after the date specified for completion. The Government has not claimed damages for this period. Obviously the basis for this is the same as in the cases just described, for, regardless of when termination occurs, the same reasons indicate the inadvisability of holding a contractor liable for subsequent delays over which he has no control.

But the same considerations which warrant freedom from liquidated damages for the period after termination of the right to proceed, whether termination occurs before or after the fixed date for completion, equally require that liquidated damages be paid for the period that the contractor continues with the work after the fixed completion date. During this period, the liquidated damage provision acts as an incentive for him to finish the job as quickly as possible and thus minimize the Government's damages. *Robinson* v. *United States*, 261 U. S. 486, 488. It is immaterial in so far as these considerations are concerned whether he subsequently finishes the work himself or not. For he is only being charged

liquidated damages for the period that the construction is under his control.

3. Respondent declares (Br. p. 18) that petitioner "is in error in stating that Article 9 'appears in all government construction contracts unless a deviation is authorized' ". In support of this statement respondent refers to various decisions and to regulations with respect to contracts made by several departments of the Government. But these decisions antedate the standard form contracts, while the regulations cited are of recent vintage, having been made pursuant to executive authorization in accordance with the First War Powers Act (55 Stat. 838, 50 U. S. C. 611) permitting departures from ordinary contracting procedure. The form of contract here in issue was U. S. Standard Form No. 23 construction contract, approved by the President November 19, 1926, and used between 1926 and 1935, during which period the Bureau of the Budget, working through the Inter-departmental Board of Contracts and Adjustments, prescribed standard forms and requested that all Government agencies use them unless deviations were authorized by the Director of the Bureau of the Budget.[4] After 1935 the same standard form was

[4] Monteith and Burack, *Methods and Procedure in Federal Purchasing* (1933), p. 172–173. Eighteen standard purchase and contract forms were prescribed in this way during 1926, including the standard form No. 23 here involved and the equally well known U. S. Standard Form No. 32 supply contract referred to by respondent. See also 17 Comp. Gen. 700, 708. The current revision of these contracts is printed in 41 C. F. R. 12.23 and 12.32.

prescribed by the Procurement Division, Treasury Department, with the approval of the Secretary of the Treasury, pursuant to Executive Order under the Reorganization Act and subsequent Regulations approved by the President.[5] Deviations must be authorized by the Director of Procurement with the approval of the Secretary of the Treasury.[6] This procedure remained in effect until recently when war conditions necessitated a departure from the previous strict requirements. Thus, from 1926 until the beginning of the war, the standard form of contract here in suit was in use throughout the government.

Respondents also deny our statement that there has been a "consistent administrative construction" of Article 9 of the standard contract in accordance with our present position. The opinions of the Comptroller of the Treasury and the Comptroller General relied upon by respondent for this statement, however, do not deal with Article 9 of Standard Form No. 23 here in ques-

[5] See Section 1 of Executive Order 6166 of June 10, 1933 (5 U. S. C., following § 132), reorganizing the functions of procurement in accordance with the Act of June 30, 1932, c. 314, secs. 401–409, 47 Stat. 413–414, as amended (5 U. S. C. 124–132), and regulations approved by the President on April 12, 1935 (41 C. F. R. 11.1–11.3).

[6] See 41 C. F. R. 11.3. Respondent is thus in error in stating (Br. p. 14) that "since 1933, the several agencies have pursued independent courses and no attempt has been made by the Budget Bureau to require uniformity." Cf. e. g., 10 C. F. R. 81.4 and 81.16 (c), relating to War Dept. contracts prior to the emergency.

tion, but with other contracts used in an earlier period. In view of respondent's frequent references to War Department regulations (Br. pp. 16–17) it should be noted that the War Department interpreted the liquidated damages clause precisely in accordance with the government's position here. See 10 C. F. R. 81.19 (e).

Respectfully submitted.

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